In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-20-00040-CR

CORNELL WITCHER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 202nd District Court
Bowie County, Texas
Trial Court No. 18F1367-202

Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Justice Burgess

MEMORANDUM OPINION

As a result of Cornell Witcher's repeated sexual encounters with Mary[1] when she was ten or eleven years old, a Bowie County jury convicted Witcher of continuous sexual abuse of a young child,[2] and Witcher was sentenced to life imprisonment and assessed a $10,000.00 fine. On appeal, Witcher challenges the sufficiency of the evidence supporting his conviction. An essential element of the offense charged is that Witcher committed two or more acts of sexual abuse during a period that was thirty or more days in duration. *See* TEX. PENAL CODE ANN. § 21.02(b). The State failed to present legally sufficient evidence to prove this element of the offense. Therefore, we reverse Witcher's conviction for continuous sexual abuse of a young child and remand this case to the trial court for a new trial on the lesser-included offenses of aggravated sexual assault and indecency with a child.

I. Standard of Review

"In evaluating legal sufficiency, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt." *Williamson v. State*, 589 S.W.3d 292, 297 (Tex. App.—Texarkana 2019, pet. ref'd) (citing *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality op.); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Hartsfield v. State*, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd)). "Our rigorous [legal sufficiency] review focuses on the quality of the evidence presented." *Id.* (citing *Brooks*, 323

[1]We use pseudonyms to refer to the minor victim and her relatives. TEX. R. APP. P. 9.10.

[2]*See* TEX. PENAL CODE ANN. § 21.02(b).

S.W.3d at 917–18 (Cochran, J., concurring)). "We examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury 'to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Id.* (quoting *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)).

The jury, as "the sole judge of the credibility of the witnesses and the weight to be given their testimony[, could] 'believe all of [the] witnesses' testimony, portions of it, or none of it." *Id.* (second alteration in original) (quoting *Thomas v. State*, 444 S.W.3d 4, 10 (Tex. Crim. App. 2014)). Juries may "draw multiple reasonable inferences as long as each inference is supported by the evidence presented at trial." *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007). "However, juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions." *Id.* Consequently, an inference based on speculation "is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt." *Id.* at 16.

"Legal sufficiency of the evidence is measured by the elements of the offense as defined by a hypothetically correct jury charge." *Williamson*, 589 S.W.3d at 298 (quoting *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). "The 'hypothetically correct' jury charge is 'one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and

adequately describes the particular offense for which the defendant was tried.'" *Id.* (quoting *Malik*, 953 S.W.2d at 240).

Under the statute and the indictment in this case, the State was required to establish beyond a reasonable doubt that Witcher, (1) during a period that was thirty or more days in duration (2) when Witcher was seventeen years of age or older, (3) committed two or more acts of sexual abuse (4) against Mary, a child younger than fourteen years of age. *See* TEX. PENAL CODE ANN. § 21.02(b). The predicate acts of sexual abuse alleged were (1) aggravated sexual assault of a child by intentionally or knowingly causing Mary's sexual organ to contact Witcher's sexual organ when Mary was younger than fourteen years of age, (2) aggravated sexual assault of a child by intentionally or knowingly causing Witcher's mouth to contact Mary's sexual organ when Mary was younger than fourteen years of age, and (3) indecency with a child by sexual contact by Witcher touching Mary's genitals with intent to gratify his sexual desire when Mary was younger than seventeen years of age. *See* TEX. PENAL CODE ANN. §§ 21.11(a)(1), 22.021(a)(1)(B)(iii), (2)(B).

Witcher only challenges the sufficiency of the evidence showing that the sexual abuse occurred for a duration of thirty or more days. Specifically, he argues that there was insufficient evidence to support an inference that the first instance of sexual abuse occurred thirty or more days before the sexual abuse ended.

II. The Evidence at Trial

Mary, who was born on July 18, 2008, testified that, in 2018, she was living in Texarkana with her mother; her older brother, Darren; a younger brother; and Witcher. She testified that, at

some point, Darren went to jail, and Witcher started coming into her room and doing things to her. Mary testified that the first time Witcher came into her bedroom, he woke her up, unclothed her, and put his penis, which she called his "thing," into her vagina, which she called her "middle part." She said that this happened more than five times. She also testified that Witcher used his mouth to lick her private area and that this also occurred more than five times. When she was asked when Witcher began doing these things, Mary responded, "When my brother went to jail." She said that it stopped when she told her sister, Erin.

Erin testified that, around the night of July 26, 2018, Mary came to spend the night. When she noticed a fishy smell on Mary that remained even after a bath, Erin asked her if someone had been messing with her. Mary told her that Witcher had been messing with her a couple of times. Mary also told her that Witcher had pulled her pants down and put his stuff in her stuff a lot. Testimony also showed that, after their older brother picked them up, they went to confront Witcher, and then Mary was taken to the hospital. Regarding when Darren went to jail, Erin was asked, "All right. In about June of -- maybe June 10th, give or take, did [Darren] get arrested and end up in the Bowie County Jail?" To which Erin responded, "Yes, ma'am."

Cristi Hicks, a nurse practitioner at the Wadley Regional Medical Center (Wadley) emergency room, testified that she treated Mary on July 28, 2018,[3] and that she performed a sexual abuse nurse examination in which Mary gave a history of sexual abuse. Mary's history was consistent with Erin's testimony. Her history also indicated that Mary stated that Witcher did it "the night before last."

[3]Mary's medical records indicate that she was seen at Wadley at 04:44 on July 28, 2018.

Dustin Thompson, an investigator for the Bowie County Sheriff's Department, was also asked about his investigation into Darren in the following exchange:

> Q [By the State]: Okay. This -- the period of time alleged in the indictment, the on or about date, June 10th, 2018 through July 28th, 2018. The testimony in this courtroom in front of this jury is that the abuse started in June when [Darren] went to jail, okay?
>
> A Correct.
>
> Q All right. In the course of your investigation, did you determine who [Darren] was?
>
> A It was the brother.
>
> Q Okay.
>
> A Yes.
>
> Q And, in fact, did you confirm that [Darren] went to jail and was incarcerated around that time in 2008 [sic]?
>
> A Yes, ma'am.

No other testimony regarding when the sexual abuse began and ended appears in the record.

III. Analysis

To support a conviction for continuous sexual abuse of a child, the State is not required to prove the exact dates of the sexual abuse, but it is required to show "that two or more acts of sexual abuse occurred during a period of thirty days or more." *Garner v. State*, 523 S.W.3d 266, 271 (Tex. App.—Dallas 2017, no pet.) (citing *Baez v. State*, 486 S.W.3d 592, 595 (Tex. App.—San Antonio 2016, pet. ref'd)). Further, although the jury is not required to agree on which specific acts were committed by the defendant or the dates on which they occurred, it must unanimously agree that the defendant committed two or more acts of sexual abuse over a period

of thirty or more days. TEX. PENAL CODE ANN. § 21.02(d); *Garner*, 523 S.W.3d at 271. Witcher argues that, although the day that the sexual abuse ended was established, there was no direct or indirect evidence of when the abuse began and that the evidence at trial did not support an inference that the abuse began thirty or more days before it ended. We agree.

In *Hooper*, the Court of Criminal Appeals explained that juries are permitted "to draw multiple reasonable inferences as long as each inference is supported by the evidence presented at trial. However, juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions." *Hooper*, 214 S.W.3d at 15. It then elucidated the difference between an inference and a conclusion based on speculation:

> [A]n inference is a conclusion reached by considering other facts and deducing a logical consequence from them. Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented. A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt.

Id. at 16. To illustrate the difference, the court posed the following hypothetical:

> A woman is seen standing in an office holding a smoking gun. There is a body with a gunshot wound on the floor near her. Based on these two facts, it is reasonable to infer that the woman shot the gun (she is holding the gun, and it is still smoking). Is it also reasonable to infer that she shot the person on the floor? To make that determination, other factors must be taken into consideration. If she is the only person in the room with a smoking gun, then it is reasonable to infer that she shot the person on the floor. But, if there are other people with smoking guns in the room, absent other evidence of her guilt, it is not reasonable to infer that she was the shooter. No rational juror should find beyond a reasonable doubt that she was the shooter, rather than any of the other people with smoking guns. To do so would require impermissible speculation.

Id. The evidence in this case is comparable to the room with the woman and other people in the room all having smoking guns.

Mary testified that the abuse ended after she told Erin about the abuse. The evidence also showed that Mary was taken to the hospital in the early morning hours of July 28, 2018, where she told Hicks that the last time Witcher had assaulted her was "the night before last night." Construing this evidence most favorably to the jury's verdict, this establishes that the last episode of abuse occurred on July 26, 2018. Consequently, to support a finding that the abuse continued for a period of thirty or more days, the evidence must support an inference beyond a reasonable doubt that one or more acts of abuse occurred on or before June 26, 2018. *See Hooper*, 214 S.W.3d at 15–16.

However, testimony regarding when the abuse began is sparse and ambiguous. Mary testified that it began when her brother went to jail. At trial, the State did not establish the precise date on which her brother went to jail,[4] and on appeal, the State does not explain how this testimony establishes that date. And the evidence in this case only vaguely references a time span during which her brother could have gone to jail. Thompson testified that his investigation showed that Darren was arrested and incarcerated "around" the period between June 10 and July 28, 2018. Erin agreed that Darren went to jail "in about June of -- maybe June 10th, give or take." The words "at some point," "around," "about," "maybe," and "give or take" make the date more uncertain, not less.[5] Thus, the jury could only have speculated from this testimony that Mary's brother went to jail on June 10.

[4]For example, in her direct examination, Mary only testified that her brother went to jail "at some point."

[5]For example, the phrase "give or take" begs the question, "Give or take what?" A couple of days? A couple of weeks? A couple of months? This term interjects substantial uncertainty into the date.

Yet, even if we assume the evidence permits a non-speculative inference that testimony that Mary's brother went to jail "around" June 10, "give or take," would allow the jury to reasonably infer the date he went to jail was on or before June 26, it does not necessarily follow that the abuse began on the very day he went to jail. The term "when" can mean both a specific time or a general reference to a time span. *See When* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2006) ("**1a**: at or during the time that: WHILE <went fishing [when] he was a boy>. **b**: just at the moment that <stop writing [when] the bell rings>."). Mary's testimony that the assaults began when her brother went to jail equally supports an inference that the abuse began on the very date her brother went to jail or that it began during that period of her life when her brother went to jail. Without more, Mary's testimony merely gives rise to speculation that the assaults began on the specific day her brother went to jail. *See Hooper*, 214 S.W.3d at 15–16.

Of course, the evidence could still be sufficient to prove the thirty-days-or-more element of this offense even if the assaults did not begin on the day he went to jail, so long as they began on or before June 26. Yet, the evidence is just as speculative as to any date during that period. To begin, Mary testified that the sexual assaults were committed in two different manners—orally and by penetration. Mary also testified that each manner of sexual assault happened more than five times. Viewing this testimony in the light most favorable to the verdict, the jury could have inferred that at least a minimum of twelve acts of abuse occurred.[6] Yet, there is *no*

[6]One more than five is six, and twice that number is twelve; therefore, the jury could reasonably infer from Mary's testimony that—at a minimum—twelve separate assaults occurred. However, to conclude a sufficient number of assaults more than twelve is sheer speculation: more than five could be any number. Of course, logically, at a

testimony regarding the frequency with which the assaults occurred. Did they happen every day, every other day, twice a day? Likewise, there is *no* testimony regarding whether Witcher assaulted Mary orally on separate occasions from when he assaulted her by penetration. In the absence of any evidence regarding the frequency of the abuse, or whether one or more manners of assault occurred on separate days, there is nothing by which the jury could infer rather than speculate that the first of the twelve assaults occurred on or before June 26.

For example, if all the sexual assaults occurred on separate days, and if Witcher assaulted Mary in only one manner on each occasion, this would indicate that the abuse began as late as July 14; if the separate manner of assaults occurred every other day and only one assault occurred each time, this would indicate that the abuse began as late as July 4. To reach back to June 26 or before, the jury would have to have inferred that (1) the assaults occurred less frequently than every other day and (2) that Witcher did not assault Mary both orally and by penetration on the same day on any occasion. Yet, no evidence to support either inference is in evidence. Thus, the jury could have inferred that the first assault occurred on or before June 26 or it could have inferred that the first assault occurred after June 26, but there is no evidence by which it could have inferred one over the other. Although such inferences "may not be completely unreasonable, . . . [they are] not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt." *Id.* at 16. Consequently, we find that no rational jury could find beyond a reasonable doubt that the sexual abuse occurred during a period that is thirty days or more in duration. *See id.* We sustain Witcher's issue.

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certain point a number of assaults beyond twelve would be unrealistic, but there is nothing in the record by which a jury could infer beyond mere speculation how many more than twelve assaults could have realistically occurred.

IV. Disposition

Generally, when we find "the evidence insufficient to establish an element of the charged offense, but the jury necessarily found the defendant guilty of a lesser offense for which the evidence is sufficient," we should "reform the judgment to reflect the lesser-included offense and remand for a new punishment hearing." *Lee v. State*, 537 S.W.3d 924, 927 (Tex. Crim. App. 2017) (citing *Thornton v. State*, 425 S.W.3d 289, 299–300 (Tex. Crim. App. 2014)). However, this mandatory reformation does not "extend to circumstances where there are multiple lesser-included offenses that meet the criteria for reformation, or where we have no way to determine which degree of the lesser-included offense the jury found the appellant guilty of." *Rodriguez v. State*, 454 S.W.3d 503, 510 (Tex. Crim. App. 2014) (op. on reh'g). In such a case, the proper remedy is remand to the trial court for a new trial of the lesser-included offenses. *Id.* at 510–11.

Under the jury charge in this case, in order to find that Witcher committed continuous sexual abuse of a child, the jury was required to find that Witcher committed at least two of the following acts: (1) aggravated sexual assault of a child by intentionally or knowingly causing Mary's sexual organ to contact Witcher's sexual organ when Mary was younger than fourteen years of age, (2) aggravated sexual assault of a child by intentionally or knowingly causing Witcher's mouth to contact Mary's sexual organ when Mary was younger than fourteen years of age, and (3) indecency with a child by sexual contact by Witcher touching Mary's genitals with intent to gratify his sexual desire when Mary was younger than seventeen years of age. Aggravated sexual assault of a child is a first-degree felony, and indecency with a child, as charged in this case, is a second-degree felony. TEX. PENAL CODE ANN. §§ 21.11(d), 22.021(e).

The evidence in this case established that Witcher committed at least two acts of aggravated assault of a child, and the same evidence would also support a jury's finding that Witcher committed at least two acts of indecency with a child. Because the jury was also instructed that it was "not required to agree unanimously on which specific acts of sexual abuse were committed by the defendant or the exact date when those acts were committed," we cannot be certain which, if any, of the offenses of aggravated sexual assault and indecency with a child the jury unanimously agreed Witcher committed, or whether the jury found that Witcher committed aggravated sexual assault or indecency with a child.

Therefore, we reverse the trial court's judgment convicting Witcher of continuous sexual abuse of a child[7] and remand this case to the trial court for a new trial on the lesser-included offenses of aggravated sexual assault of a child and indecency with a child. *See Rodriguez*, 454 S.W.3d 503; *see also Hines v. State*, 551 S.W.3d 771, 783 (Tex. App.—Fort Worth 2017, no pet.) (applying *Rodriguez* when conviction for continuous sexual abuse of a child was reversed).

Ralph K. Burgess
Justice

Date Submitted: November 23, 2020
Date Decided: December 21, 2020

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[7]The amended judgment in this case incorrectly recites that Witcher was convicted of aggravated sexual assault of a child. Normally, we would modify the judgment to reflect that Witcher was convicted of continuous sexual abuse of a child. However, since we are reversing Witcher's conviction, such modification is unnecessary.